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Mukhriz Mahathir v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak (suggested contemnor) & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-1728–08 OF 2017
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND HASNAH HASHIM JJCA
C 20 APRIL 2018

Civil Procedure — Contempt of court — Application for — Allegation of contempt for publishing statements pending defamation suit — High Court heard matter as opposed ex parte — Whether High Court erred in hearing matter as opposed ex parte — Whether there was prima facie case of contempt — Rules of Court 2012 O 52 r 3

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The appellant filed a defamation suit at the High Court against the second respondent, the press secretary of the first respondent as it was alleged that the second respondent had issued statements intended to cause damage to the appellant's reputation. The High Court had fixed the trial date but six days before the commencement of the trial, the first respondent published a statement on www.najibrazak.com which the appellant contended was directed at him. According to the appellant: (a) the statement was made in reference to him and had the same meaning with the impugned statements in the defamation suit at the High Court; and (b) the statement was against the principle of subjudice and prima facie an act of contempt of court. The appellant filed an application initiating committal proceedings. The High Court judge ('the HCJ') allowed the first respondent's solicitors to appear before the High Court despite the appellant's objection. The HCJ also allowed the first respondent to submit only on points of law. The application was dismissed by the High Court. Hence the present appeal. The issues that arose were: (i) whether the HJC erred when he heard the matter as opposed ex parte; and (ii) whether there was prima facie case of contempt.

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Held, dismissing appeal:

(1) In an ex parte application, there must be full and frank disclosure of material facts by the applicant. The applicant must only make submissions in support of the application and also highlight potential arguments against the grant of the application, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. While O 52 r 3 of the Rules of Court 2012 provides that an application must be made ex parte,

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the court still retains the discretion to order that the matter be heard inter parte with the necessary directions if the circumstances so warrant and this discretion must, no doubt, be exercised judiciously. The HCJ could not be faulted for ordering that the matter be heard as opposed ex parte (see paras 18 & 24).

(2) The test required to be met before leave is granted is that the appellant must satisfy the court that there was a prima facie of contempt. The appellant had not made out a prima facie case of contempt against the respondent. There was no error in the findings of the HCJ (see paras 27–28).

[Bahasa Malaysia summary

Perayu telah memfailkan guaman fitnah di Mahkamah Tinggi terhadap responden kedua, Setiausaha Akhbar responden pertama kerana mendakwa bahawa responden kedua telah mengeluarkan pernyataan-pernyataan yang berniat menyebabkan kejejasan pada reputasi perayu. Mahkamah Tinggi telah menetapkan tarikh bicara tetapi enam hari sebelum bermulanya perbicaraan, responden pertama menerbitkan satu kenyataan di www.najibrazak.com yang perayu hujahkan ditujukan kepadanya. Menurut perayu: (a) pernyataan ini dibuat merujuk kepadanya dan mempunyai maksud yang sama dengan pernyataan-pernyataan yang dipertikaikan dalam guaman fitnah di Mahkamah Tinggi; dan (b) pernyataan ini dibuat bertentangan dengan prinsip subjudis dan prima facie satu penghinaan mahkamah. Perayu memfailkan permohonan bagi memulakan prosiding pengkomitan. Hakim Mahkamah Tinggi ('HMT') membenarkan peguam cara responden pertama untuk hadir di Mahkamah Tinggi walaupun ditentang oleh perayu. Hakim Mahkamah Tinggi juga membenarkan responden pertama berhujah berdasarkan hujahan-hujahan undang-undang. Permohon ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Isu-isu yang timbul adalah: (i) sama ada HMT terkhilaf apabila beliau mendengar hal perkara tersebut dan bukan secara ex parte; dan (ii) sama ada terdapat kes prima facie penghinaan.

Diputuskan, menolak rayuan:

(1) Dalam permohonan ex parte, mesti terdapat pendedahan penuh dan jujur fakta material pemohon. Pemohon mestilah membuat hujahan-hujahan yang menyokong permohonannya sahaja dan juga mengutarakan hujahan-hujahan berpotensi terhadap pembenaran permohonan, termasuk fakta-fakta yang mungkin dibangkitkan oleh penghina yang didakwa dicadangkan dalam menolak permohonan jika ia adalah permohonan inter parte. Walaupun A 52 k 3 Kaedah-Kaedah Mahkamah 2012 memperuntukkan bahawa satu-satu permohonan mesti dibuat secara ex parte, mahkamah masih mempunyai bidang kuasa mengarahkan hal perkara didengar secara inter parte dengan arahan-arahan yan perlu jika hal keadaan mewajarkannya dan bidang

kuasa ini mestilah, tanpa ragu-ragu, dijalankan dengan bijak. Hakim Mahkamah Tinggi tidak boleh dipersalahkan kerana mengarahkan hal perkara tersebut didengar dan tidak secara ex parte (lihat perenggan 18 & 24).

(2) Ujian yang perlu dipenuhi sebelum kebenaran diberi adalah perayu mesti memuaskan hati mahkamah bahawa terdapat prima facie penghinaan. Perayu gagal membuktikan kes prima facie penghinaan terhadap responden. Tiada kekhilafan dalam dapatan HMT (lihat perenggan 27–28).]

Notes

For cases on contempt of court in general, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reisue) paras 2417–2620.

Cases referred to

Chuan Huat Lin Lime Factory v Yap Chee Seng & Ors [1995] MLJU 5, HC (refd)

Dato' Oon Ah Baa @ Boon Pak Leong & Others v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Others [2003] MLJU 291; [2003] 7 CLJ 81, HC (refd)

Guan Teik Sdn Bhd; Ex parte (subsituting Lim Oo Guan, deceased) [2010] 1 MLJ 1, FC (refd)

Lim Nyook Yin v Ultratech Sdn Bhd & Anor [1995] 1 MLJ 498, HC (refd)

Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and another [1972] 3 All ER 384, Ch D (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 3 CLJ 210, SC (refd)

Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals [2010] 3 MLJ 459, HC (refd)

Legislation referred to

Rules of Court 2012 O 52 r 3

Appeal from: Civil Suit No WA-23-NCVC-22–05 of 2016 (High Court, Kuala Lumpur)

Mohamed Haniff Khatri Abdulla (Mohd Irzan Iswatt bin Mohd Noor with him) (Haniff Khatiri) for the appellant.

Mohd Hafarizam Harun (Yazid Mustaqim Roslan and JR Teh with him) (Hafarizam Wan & Aisha Mubarak) for the first respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This appeal arose from the decision of the High Court Kuala Lumpur made on 27 July 2017 dismissing the appellant's application to commit the first respondent. We had, after perusing the records of appeal and considering the written and oral submissions of learned counsels for the appellant and the respondent, unanimously dismissed the appeal with costs. Our reasons appear below.

MATERIAL FACTS

[2] The appellant filed a defamation suit in the High Court (WA-23NCVC-22–05 of 2016) against the second respondent who is the press secretary of the first respondent. It is the appellant's case that the second respondent had issued statements on 15 April 2016, 20 April 2016, 23 April 2016 and 26 April 2016 intended to cause damage to the appellant's reputation.

[3] The High Court fixed the trial dates for the aforesaid suit on 13 July 2017 and 14 July 2017. The trial dates of the suit was reported by various media. However, six days before the commencement of the trial the first respondent published a statement on 7 July 2017 through www.najibrazak.com entitled 'Pusingan U Terkini Dr Mahathir Bukti Panik Terhadap Suruhanjaya Siasatan Diraja (RCI)' ('the article') which the appellant contended is directed at him in particular the statement as follows:

> ... dia (Tun Dr Mahathir) obses untuk menyelamatkan legasi keluarganya dan menjadikan anaknya Mukhriz sebagai Perdana Menteri.

[4] It is contended by the appellant that the above statement was made in reference to the appellant and has the same meaning with the impugned statements in the defamation suit in the High Court. The impugned statements in the defamation suit are as follows:

> (a) Dato' Seri Mukhriz Mahathir memberitahu akhbar asing semalam bahawa beliau tidak bercita-cita untuk menjadi Perdana Menteri. Jadi mengapa beliau bertanding untuk jawatan Naib Presiden UMNO pada tahun 2013?
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> Setiap orang dalam politik Malaysia tahu bahawa hanya seseorang yang ingin menjadi Presiden UMNO, yang sekaligus menjadi Perdana Menteri, akan bertanding untuk menjadi Naib Presiden. Ia adalah langkah penting dalam usaha mendaki tangga ke jawatan teratas; and
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> (b) Tun Mahathir seharusnya bersara dengan hormat dan benarkan anaknya berdiri atas kakinya sendiri di dalam politik, terutamanya memandangkan Dato Seri Mukhriz Mahathir kini mendakwa bahawa beliau memiliki 80% sokongan di dalam UMNO. Bertahun-tahun, Tun Mahathir cuba untuk mengangkat anaknya ke jawatan teratas UMNO, tetapi beliau tidak akan mengakuinya Cubaan untuk

menjatuhkan seorang Perdana Menteri semata-mata untuk kepentingan anaknya adalah satu langkah yang tidak dapat diterima oleh ahli-ahli UMNO.

[5] The appellant further contended that the statement published by the first respondent was against the principle of subjudice and prima facie an act of contempt of court committed by the first respondent.

[6] Through his solicitor the appellant issued a notice of demand dated 10 July 2017 to the first respondent seeking a public apology.

[7] The appellant filed the notice of application initiating the committal proceedings on 14 July 2017. During the case management of the said notice of application the High Court fixed the hearing of the application on 20 July 2017 and directed the appellant's solicitors to serve the relevant cause papers on the first respondent.

[8] The High Court allowed the first respondent's solicitors to appear before the High Court despite the appellant's solicitors' objection. The learned High Court judge also allowed the first respondent's counsel to submit only on points of law.

THE ISSUES

[9] The determinative issues in this appeal are as follows:

(a) whether the learned judge erred when he heard the matter as opposed ex parte; and

(b) whether there is prima facie case of contempt.

THE SUBMISSIONS OF COUNSEL

[10] In support of the appeal, learned counsel for the appellant submitted that the High Court judge had erred in law and fact when he held that the appellant had failed to satisfy the requirement under O 52 r 3 of the Rules of Court 2012 ('the ROC'). Learned counsel in his submission argued that the High Court judge erred for not taking into consideration that the application for leave of committal is governed under O 52 r 3 of the ROC. An application for leave under the said order must be made ex parte. Therefore, since it is an ex-parte application the High Court judge erred when he allowed the first respondent's counsel to appear and submit before the court.

[11] Learned counsel referred to the majority decision in the Federal Court's case of *Ex parte: Guan Teik Sdn Bhd (subsituting Lim Oo Guan, deceased)* [2010] 1 MLJ 1 where it was explained:

[44] An ex parte application is therefore one that is made without notice to, or argument by, the person to be affected. Obviously this will exclude the consent of the person concerned. This means that r 41 clearly has in contemplation the dispensation of the consent of the person to be added as a party. This view is supported by the fact that the person added as a party may apply to the court to discharge or vary the order at any time within 12 days from the service thereof on him pursuant to r 43. This will only arise if the order making him a party was, in the first place, obtained without his consent. Effect must therefore be given to the clear language used in r 41. As the rule is capable of only one construction it must be given the meaning it conveys as explained in the passages from Bindra's Interpration of Statutes (7th Ed) reproduced earlier. In the final analysis an application under r 41 does not require the consent of the person who is to be made a party. The answer to the question posed is therefore in the negative. The procedure adopted by the defendant is thus correct in law.

[12] Thus, since O 52 r 3 of the ROC expressly provided that the leave application is by an ex parte application the High Court erred when it directed the appellant to notify the first respondent of the said leave application and to allow the first respondent to appear and submit on merit.

[13] It was further submitted by learned counsel that the High Court judge erred in fact and law when he failed to exercise his discretion properly. In his submission learned counsel argued that the learned High Court judge failed to apply his mind towards the main disputed issues in the pending defamation suit in the following manner:

(a) failed to consider the full text of the impugned statement and apply it to the main issue in the pending defamation case;

(b) read the statement published by the first respondent dated 7 July 2017 in its entirety; and

(c) should have taken into consideration that the law of contempt cannot be used to curtail public discussion vis a vis freedom of speech.

[14] In resisting the appeal, learned counsel for the first respondent argued that for the appellant to succeed in its application for leave for committal the appellant is required to show a prima facie case. Learned counsel for the first respondent submitted that there is no correlation between the impugned statement and the subject matter. The article in question must be read as a whole and not confined to the meaning as contended by the appellant.

[15] The allegation made by the appellant that unnecessary influence has been placed to the court because of the status and position of the first respondent as the Prime Minister of Malaysia is absurd and unfounded. Therefore, the appellant's appeal against the refusal to grant leave has no merits and ought to be dismissed.

A OUR GROUNDS OF DECISION

[16] Before we proceed to deal with the issues before us and for ease of our discussion of the same we think that it necessary to set out the relevant provision, O 52 r 3 of the ROC which provides as follows:

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> 3(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
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> (2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

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D *Whether the learned judge erred when he heard the matter as opposed ex parte*

[17] In his grounds of judgment the learned High Court judge gave his reasons for ordering that the application be heard as opposed ex parte:

> [3] Walaupun permohonan plaintif (Kandungan 40) di failkan secara ex-parte, saya mengarahkan kertas kausa berkenaan diserahkan keatas PYD. Susulan itu, pada 20 July 2017, tarikh pendengaran permohonan ini peguambela PYD telah hadir mewakili beliau. PYD membantah permohonan plaintif.
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> [4] Setelah mengambil kira prinsip kes-kes *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and another* [1972] 3 All ER 384; *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498 dan *Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals* [2010] 3 MLJ 459, saya mengarahkan permohonan plaintif didengar secara 'opposed ex-parte'. Saya membenarkan peguam PYD untuk berhujah, bagi membantu mahkamah di atas isu/kedudukan undang-undang. PYD tidak dibenarkan untuk memfailkan affidavit jawapan di peringkat tersebut.

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[18] In order for the court to be able to make a fair and just decision all the relevant facts must be before it. In an ex parte application, there must be full and frank disclosure of material facts by the applicant. The applicant must only make submissions in support of the application and also highlight potential arguments against the grant of the application, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. Whilst O 52 r 3 of the ROC provides that an application must be made ex parte the court nevertheless still retains the discretion to order that the matter be heard inter-parte with the necessary directions if the circumstances so warrant and this discretion must no doubt be exercised judiciously.

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[19] VT Singam J in the case of *Dato' Oon Ah Baa @ Boon Pak Leong &*

Others v Eagle & Pagoda Brand Teck Aun Medical Factory Sdn Bhd & Others [2003] MLJU 291; [2003] 7 CLJ 81 made the following observation:

> In *London City Agency (jcd) Ltd and another v Lee and others* [1970] 1 Ch 597, the plaintiffs had obtained an interlocutory injunction granted ex parte by the Vacation Judge, His Lordship Eveleigh J. The defendants then filed an ex parte application to discharge the interlocutory injunction granted ex parte. In varying the said interlocutory injunction, His Lordship Megarry J observed:
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> > Although the application before me is made ex parte, counsel for the plaintiffs has been present and has considerably assisted the court.

[20] In *Dato Oon Ah Ba* Justice VT Singam was of the view that although the plaintiffs' application for leave was made ex parte, there was nothing irregular for the said defendants' counsel to be present in court where the said defendants became aware of this application and if necessary to assist the court if called upon even in an ex parte application.

[21] Megarry J, in *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and another* [1972] 3 All ER 384 observed that the court would be greatly assisted in deciding whether or not to grant the ex parte injunction by knowing the contentions that may be advanced against the grant of the application. The court would then be aware of the general line of evidence in opposition to the application when it hears the application inter partes. It makes it possible for the disputed facts and issues to be highlighted thus saving the court's time. To appreciate this point, we reproduce the relevant portion of Megarry J's remarks in *Pickwick International*:

> At this stage I may mention a procedural point upon which there appears to be no reported authority. Both before me and before the Court of Appeal the defendants were present at the hearing of the ex parte application, and took part in it in order to assist the court. The ex parte motion thus became what may be termed an opposed ex parte motion. The fact that this is a contradiction in terms ought not be allowed to obscure the utility of the process. The practice seems to be of comparatively recent origin, though it has been pointed out to me that at least to some extent it may be a reversion to a procedure in the early part of last century, which, if not usual, was at least permissible: see *Acraman v Bristol Dock Co* (1830) 1 Russ & M 321. The practice supplements, without supplanting, the former practice of moving ex parte, with the party moved against being silently present and taking no part in the proceedings unless an injunction was granted, in which case he thereupon moved ex parte to vary or discharge that injunction. Of course, if the party moved against is not present he can similarly move ex parte to vary or discharge the injunction when he learns of it.
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> In most cases the court will obviously be assisted in deciding whether or not to grant the ex parte injunction by knowing what contentions may be advanced against the grant, and what is the general line of the evidence in opposition that is likely to be filed when the applicant later moves on notice. An advantage to the applicant is that the court, having heard what there is to be said in opposition to the grant of the

injunction, may sometimes be encouraged to grant an injunction that otherwise would be refused. Furthermore, the applicant may escape an avoidable liability on his undertaking in damages, though the other procedure also achieves this result. Nevertheless, there is a considerable practical difference between the ebb and flow of argument in inter partes proceedings, and the still life of hearing all that one side has to say, reaching a decision, and then hearing separately all that the other side has to say. There can be no doubt, too, that proceedings inter partes usually make it possible for the real points to emerge more quickly, and thus save time.

[22] In *Chuan Huat Lin Lime Factory v Yap Chee Seng & Ors* [1995] MLJU 5 His Lordship KC Vohrah J (as he then was) had ordered the ex parte application for leave to commit the defendant to prison for a breach of an injunction order to be heard inter partes as the court wanted to hear arguments whether in the first place there was a prima facie case of contempt.

[23] The learned High Court judge had also relied on *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498 and *Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals* [2010] 3 MLJ 459.

[24] Hence, the learned High Court judge cannot be faulted for ordering that the matter be heard as opposed ex parte. Based on the above cited authorities the approach taken by the High Court judge is not without precedent. Therefore, on the first issue we find no error on the part of the High Court judge in deciding to hear the matter as an opposed ex parte.

PRIMA FACIE CASE OF CONTEMPT

[25] In *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 3 CLJ 210 Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, stated as follows:

In the appeals before us, leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted that there was a prima facie case for contempt against the appellants. It may well be that on the hearing of the Motion proper, the appellants will be acquitted of any charge of contempt ...

[26] The High Court in *Dato' Oon Ah Baa* made the following observation:

In other words, the test required to be met before leave is granted is that the applicant must satisfy that there is a prima facie case of contempt.

[27] Thus, the test required to be met before leave is granted is that the appellant must satisfy the court that there is a prima facie case of contempt. The learned High Court judge had scrutinised the statement in the article allegedly made by the first respondent and in his grounds of judgment had concluded:

[14] ... Saya telah membaca dan menelitikeseluruhan kenyataan PYD berkenaan

(Ekshibit *(sic)* 'MM1' — Kandungan 41). Namun, saya tidak nampak di mana-mana bahagian kenyataan tersebut yang menyentuh mahkamah atau perihal guaman sivil ini sedikit pun. Kenyataan PYD adalah diitujukan dan merujuk kepada Tun Dr Mahathir secara khusus. Tidak dinafikan nama plaintif ada disebut dalam penulisan PYD tersebut tetapi secara keseluruhan penulisan tersebut ditujukan kepada Tun Dr Mahathir. Tun Dr Mahathir dan juga PYD bukanlah pihak dalam guaman sivil ini.

[15] ... Saya mendapati kenyataan PYD tentang Tun Dr Mahathir yang disiarkan oleh PYD pada 7 July 2016 tersebut adalah merupakan kesinambungan 'perbalahan' mereka tersebut dan tiada kena mengena dengan kes fitnah antara plaintif dan defendan dalam guaman sivil ini.

[28] In so far as the second issue is concerned we are in agreement with the learned High Court judge that the appellant has not made out a prima facie case of contempt against the first respondent. We find no error in the findings of the learned High Court judge. In para 16 of his grounds of judgment His Lordship had taken into consideration that the law of contempt cannot be used to curtail the freedom of speech:

[16] ... pada hemat saya, kedua-dua pihak atau mana-mana pihak ketiga sekali pun bebas dan berhak untuk bersuara dan meluahkan pendapat masing-masing tentang perbalahan politik antara PYD dan Tun Dr Mahathir asalkan ianya tidak melanggar batasan undang jenayah atau sivil.

[29] It is an established principle that an appellate court will not interfere with the exercise of a discretionary jurisdiction of the court below unless that discretionary jurisdiction was not exercised judicially or was wrong in law. In this appeal, there is nothing to show that the learned High Court judge had exercised his discretion wrongly. The grant or the refusal of an application is very much an exercise of a judge's power of discretion and the question that must be determined is whether he had exercised his discretion judicially.

[30] Accordingly, we are not satisfied that His Lordship was plainly wrong in his exercise of discretion and we find that the judge had rightly exercised his discretion in refusing the application.

CONCLUSION

[31] After hearing respective learned counsel and upon due consideration of their oral submissions, written submissions and the records of appeal we find no merits in the appeal. We do not find any appealable error in the decision of the High Court judge to merit appellate intervention. We therefore, dismissed the appeal with costs of RM10,000 subject to the payment of allocator and affirmed the decision of the High Court. The deposit of the appeal be refunded.

Appeal dismissed with costs of RM10,000 subject to the payment of allocator.

Reported by Afiq Mohamad Noor